MF 97-1
Tax Type: MOTOR FUEL TAX
Issue: Off-Highway Usage Exemption

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	)	
v.	)	**No.**
	)	**Motor Fuel Tax**
	)	**Claim for Credit**
TAXPAYER	)	
	)	**C. O'Donoghue**
Taxpayer	)	**Admin. Law Judge**

RECOMMENDATION FOR DISPOSITION

Appearances: Mr. John Dore for TAXPAYER; Mr. Alan Osheff, Special Assistant Attorney General, for the Illinois Department of Revenue.

Synopsis:

This matter comes on for hearing pursuant to the TAXPAYER's (hereinafter referred to as "taxpayer") timely protest of the Illinois Department of Revenue's ("Department") denial of a claim for refund on January 24, 1996. Taxpayer, a residential concrete contractor, filed a claim for credit for motor fuel tax paid on fuel used in off the road vehicles. Taxpayer acknowledges that such claim was based upon estimates rather than supported with original invoices but contends that the documents submitted by the taxpayer provide sufficient evidence as to the amount of the claim and that accordingly, taxpayer is entitled to the refund. At issue is whether taxpayer's claim for credit, based upon estimated off the road usage, is properly denied pursuant to 86 Illinois Administrative Code Sec. 500.245. Following the submission of all evidence and a review of the record, it is recommended that this matter be resolved in favor of the Department.

Findings of Fact:

1. The Department's *prima facie* case, inclusive of all jurisdictional elements, was established by the admission into evidence of the notice of denial of a claim for refund, showing a total claim in the amount of $8444.56 for the period covering January 1, 1994 through December 31, 1994. Dept. Ex. No. 2.

2. Taxpayer submitted a verified claim for refund of the special fuel tax paid during 1994 with attached fuel invoices reflecting total gallons purchased for both taxable and nontaxable use. Dept. Ex. No. 1; Taxpayer Ex. No. 1. The claim is comprised of two parts, the first is for form oil, which is oil sprayed upon concrete forms to enable the forms to be lifted away from the hardened concrete. The second part is for fuel used in off the road vehicles. Tr. pp. 20, 21.

3. Taxpayer is a residential concrete contractor. Its' work includes concrete driveways, sidewalks, foundations and curbs. Taxpayer utilizes a small front end loader, known in the industry as a Bobcat, in its business. Bobcats are only used in an off the road capacity. Tr. pp. 17, 18.

4. Taxpayer does not have separate tanks to hold the fuel for the Bobcats apart from fuel for its on the road trucks. Tr. pp. 37, 55. During the audit period in question, there were no meters on the holding tanks to determine the exact gallons taken out of the tank at any one time. Tr. p. 39.

5. Taxpayer used a separate tank to store fuel for use as form oil. Tr. p. 38. The company identified the exact amount of fuel that was used on the forms by submitting invoices to the Department. Tr. pp. 28, 30, 38. This part of the claim was not at issue at this hearing, as represented by the parties. Tr. p. 38.

6. Taxpayer used estimates as to the number of gallons used per hour in the Bobcats and other off the road equipment and was not able to furnish the Department with proof of the exact number of gallons of motor fuel used. Tr. p.

41. These estimates were based upon the manufacturer's specifications regarding hourly fuel usage. Tr. p. 42.

7. The manufacturer's specifications were based on an average usage of gallons. Tr. p. 43. This average could be dependent on different factors, such as terrain and the maintenance of the equipment. Tr. p. 43

Conclusions of Law:

The Department, in denying taxpayer's claim for credit, relied upon Section 500.245 of the regulations. This regulation provides:

> Estimated Claims Not Acceptable
> The Department will not approve claims for refund of Motor Fuel Tax where such claims are based upon a showing that part of such motor fuel was used for a taxable purpose, and that the part for which refund is claimed cannot, as a practical matter, be definitely and exactly calculated and itemized, but can only be estimated. Even where such claims are estimated or calculated with such certainty as is possible and practicable, they will be rejected. Only claims which are supported by positive proof of the exact amount of motor fuel not used for a taxable purpose will be approved.

86 Ill. Admin. Code ch. I, Sec. 500.245.

Taxpayer puts forth several arguments as to why the Department should be precluded from using this regulation to deny its claim for credit. First, it argues that it has produced competent evidence to prove that its own calculations are correct. Secondly, taxpayer contends that Sections 500.240 and 500.235 of the regulations contradict Section 500.245, thus making the application of Section 500.245 unreasonable under the present circumstances. Lastly, taxpayer maintains that Section 500.245 of the regulations is not within the scope contemplated by the Motor Fuel Tax Act.

Taxpayer asserts that case law allows it to produce competent evidence in sustaining its burden of proof to establish the tax liability, citing Young v. Hulman, 39 Ill. 2d 219 and Elkay Manufacturing Company v. Sweet, 202 Ill. App. 3d 466 as authority. The taxpayer further states that it is allowed to use its

books and records to establish the amount of claim and once these books and records are shown to be competent, the burden shifts to the Department. Mel Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203. Taxpayer believes that its estimates of fuel used in its off the road vehicles are competent evidence and thus the burden shifts back to the Department to prove the taxpayer's calculations are incorrect.

Taxpayer's argument is flawed in several important respects. The case law cited by the taxpayer addresses what is required of a taxpayer to rebut the *prima facie* correctness of a Department assessment. In that instance, an auditor has determined, based upon the best evidence available during the audit, that the taxpayer owes the Department additional monies. Even though case law affords the taxpayer the right to bring in competent evidence to rebut the Department's determinations, the taxpayer's evidence must relate to specific transactions which the auditor had classified as taxable during the audit. Those cases do not give the taxpayer the right to bring in general documentation or give estimates as to what it believes the liability ought to be. It is well established that to rebut the *prima facie* case the taxpayer "must produce competent evidence, identified with their books and records showing that the Department's returns are incorrect." Copilevitz v. Department of Revenue, 41 Ill. 2d 154 (1968); Masini v. Department of Revenue, 60 Ill. App. 3d 11 (1st Dist. 1978).

In the situation presented here, the Department is not maintaining that the taxpayer owes additional tax. Rather, the taxpayer is asking for monies back from the State of Illinois - monies which relate to specific transactions recorded in the company's books and records. The Department, through promulgation of regulation 500.245 and 500.235, requires the taxpayer provide specific invoices to prove the amount the taxpayer claims it is entitled back from the Department. These invoices must contain such information as the date of delivery, name and address of the purchaser, name and address of seller, number of gallons purchased, price per gallon and the Illinois Motor Fuel Tax

listed as a separate item as well as receipt of payment. The Department requires such specificity as a safeguard to prevent unjust enrichment. Taxpayer is in the best position of being able to provide the necessary documentation to show the amount of any claim and the information required does not seem an undue burden on any taxpayer with a legitimate claim. The Department should not be required to rely on estimates in giving back tax monies where the taxpayer could reasonably provide documentation. The lack of a requirement for specificity rewards a taxpayer for keeping poor books and records. In addition, reliance on estimates to refund dollars to a taxpayer is an unreasonable procedure as it can lead to giving back funds not actually paid to the State.

Furthermore, the taxpayer relied upon the manufacturer's specifications, that is, documentation outside its books and records to determine the estimates. Taxpayer claims that it tested these specifications, however the testing method and the results are not a part of the record which make taxpayer's estimates unreliable. Tr. p. 54.

For additional support, taxpayer cites Section 500.240 of the regulations which allows a purchaser of motor fuel to provide certification as to the percentage of the purchase which will be for taxable use. This regulation does not apply under the circumstances presented here for two very important reasons. First, the regulation specifically provides that the fuel be used in self-propelled highway construction or maintenance equipment which will be used in a dual capacity, both for the repairing of highways and the propelling of equipment to and from a job site. Nothing in the record indicates that the equipment in question meets this prerequisite. Even setting this requirement aside, this regulation was enacted to allow a *supplier* to accept, in good faith, a certification of the percentage of taxable use from a purchaser and not be susceptible to further scrutiny from the Department. Nothing in the regulation precludes the Department from auditing the purchaser and requiring him to provide documentation to prove the claimed taxable versus nontaxable percentage is accurate. This documentation would necessarily include invoices. Such a

circumstance is similar to a retailer accepting a resale certificate in good faith. Absent fraud, if a resale certificate is complete upon its four corners, the retailer has met its obligation under the law. The Department may, of course, require documentation from the purchaser to prove a transaction was for resale.

This differentiation is important in that it allows a retailer to freely accept certificates and conduct business. After all, it is the purchaser who has the necessary source documents to prove the taxable or nontaxable nature of a transaction. TAXPAYER as the purchaser of fuel has the ability to keep and maintain the original documents and it is not unreasonable for the Department to require such. Thus, it is clear that this regulation does not support TAXPAYER's position that it be allowed to use estimates in calculating its claim.

Moreover, the taxpayer could have provided the exact gallons used in its off the road vehicles for the audit period in question. Meters have in fact been installed on the tanks since the audit period. Tr. p. 56. These meters provide an easy and efficient method of calculating the exact gallons used in off the road vehicles and the taxpayer need not use estimates.

Taxpayer also cites Regulation 500.235 which allows a taxpayer who loses its invoices to provide an affidavit in support of a claim for credit. This affidavit must contain the same information as was on the invoice, plus a statement of facts explaining the loss of the invoice and justifying the substitution of the affidavit. Note that the regulation requires the same information as required on the original invoice, thus requiring that the claim be based upon actual gallons used for a nontaxable purpose. Taxpayer must have necessarily had an original invoice in order to lose it. Thus, this regulation does not give the taxpayer any right to estimate claims.

Lastly, taxpayer maintains that the Department's regulations are not within the scope of the Motor Fuel Tax Act. However, Section 13 of the Motor Fuel Tax Law, which addresses motor fuel tax claims, provides that: "The claim must

state such facts relating to the purchase, importation, manufacture or production of the motor fuel by the claimant as the Department may deem necessary, and the time when, and the circumstances of its loss or the specific purpose for which it was used (as the case may be), together with such other information as the Department may reasonably require. ..." 35 **ILCS** 505/13. The statute specifically allows the Department to use its discretion in setting up the requirements a taxpayer must meet to attain a refund as discussed, *supra*. Regulation 500.245's prohibition of estimates in calculating claims for credit is a necessary and reasonable tool in the Department's administration and enforcement of the Motor Fuel Tax Act.

For the reasons stated above, I conclude that taxpayer's estimates are insufficient as a matter of law to overcome the Department's *prima facie* case and that accordingly, the Department's denial of the claim for refund should be finalized as issued.

Christine O'Donoghue
Administrative Law Judge